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No. 10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.

Appellant.

vs.

STANLEY J. BOWERS, TAX COMMISSIONER
OF OHIO,

Appellee.

REPLY BRIEF FOR APPELLANT.

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I

**FORMER SECTION 5701.08, REVISED CODE OF OHIO,
DENIES RESIDENTS EQUAL PROTECTION OF
THE LAWS.**

Former Section 5701.08, Revised Code of Ohio, taxed all storages of tangible personal property held for use in business in Ohio, excepting agricultural products and merchandise belonging to a nonresident and held for storage only. The terms "storage only" have been construed by the Ohio Supreme Court on three separate occasions, *General Cigar Co., Inc. v. Peck*, 159 Ohio St. 152, 111 N. E. 2d 265 (1953); *B. F. Goodrich v. Peck*, 161 Ohio St., 202, 118 N. E.

2d 525 (1954); and *Grinnell Corp. et al., v. Bowers*, 167 Ohio St., 267, 147 N. E. 2d 657 (1958). These cases hold that where a nonresident corporation does business in the State of Ohio (either manufacturing or retail selling), and where pursuant to that business it stores goods, without any processing being done to them during storage, and for later transportation over a public highway to the place of business in Ohio (either to the plant or retail store), such property is for "storage only" and therefore is not subject to Ohio's tangible personal property tax.

Taking into consideration the Ohio Supreme Court's construction, the only possible bases for imposing a discriminatory tax on merchandise (held for storage only by resident businesses would be that residents somehow use property in business differently from nonresidents, or somehow hold property in storage only for use in business differently from nonresidents. The Ohio statutes contain no provision to that effect, nor do the cases decided by the Ohio Supreme Court and indeed they clearly disprove it. A typical example is the *Goodrich Case, supra*, where the taxpayer was a nonresident corporation engaged both in manufacturing and retail selling in Ohio. Its manufacturing operations and methods of storing raw materials are indistinguishable from those of The Youngstown Sheet and Tube Company. Likewise, its retail selling operations and methods of storing retail merchandise are indistinguishable from those of Allied Stores of Ohio, Inc. Yet both the Youngstown and Allied companies, and other residents similarly situated, have been denied the equal protection of the laws by being forced to pay a tax which Goodrich and nonresident businesses in general are protected from paying under the statute.

In view of the above, it is unrealistic for the commissioner to argue, as he does on page 6 of his brief in *Allied Stores of Ohio, Inc. v. Stanley J. Bowers* (No. 10), that nonresidents doing business in Ohio store property for use in their Ohio business enterprises less frequently than do resident businesses, and the number of cases in which nonresidents have claimed the benefit of the exception proves just the contrary to be true.

As between any two given companies engaged in the same kind of business and to the same extent, both would hold merchandise for storage only for purposes of their businesses, regardless of where they were incorporated. The amount of property held for storage only depends upon a company's business, not upon where it may have happened to have filed its incorporation papers.

Moreover, in the *Allied Stores Case* (No. 10), the Ohio Board of Tax Appeals, which was the forum of original jurisdiction, found expressly on the facts that Allied Stores conducted its retail business in exactly the same way as did the Goodrich Company in the case of *B. F. Goodrich v. Peck, supra*, and that the only difference between, and the only reason why Goodrich was excepted and Allied taxed, was residence. This finding of fact was not disturbed by the Ohio Court of Appeals or the Ohio Supreme Court.

The Commissioner also argues in his Allied Stores brief on page 6, that the exception was designed to induce out-of-state businesses to come into Ohio. In the first place, the exception is not extended to out-of-state businesses, but to nonresidents, which is something entirely different. The state where a corporation has its residence has nothing to do with the state or states where it does business. And in the second place, aside from merchandise held for storage only, in every other instance under the Ohio personal prop-

erty tax statutes, residents and nonresidents alike pay the same taxes. Were Ohio seeking to encourage out-of-state businesses to locate in Ohio, it would have granted the exception in those terms, rather than in terms of residence, and it would have granted the exception across the board, rather than just for "storage only."

Finally, the commissioner refers to the case of *Madden v. Kentucky*, 309, U. S. 83, 88 (1940), which states.

"Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden."
(Emphasis added.)

It has already been amply demonstrated that the discrimination in the instant case against resident businesses results in an inequitable tax burden being cast upon them. The tax here cannot, therefore, bring about an equitable distribution of the tax burden, but has the single effect of penalizing resident businesses unfairly, simply because of their residence, and as appellant showed in its original brief, where a tax is upon property, as it is in this case, a classification based upon the owner's residence is unconstitutional.

Admittedly, Ohio may make the statutory declaration that property held for storage only and not yet devoted to a business use is not used in business and therefore is not taxable, but it may not do so with regard to one group in a class (nonresidents) and refuse to do so with regard to others in the same class (residents). In sum, it cannot protect one group from tax on the ground that its property held for storage only is not used in business, and refuse to grant equal protection for the same property to others in the same class.

THE EXCEPTION FOR PROPERTY HELD FOR STORAGE ONLY CANNOT BE REMOVED BECAUSE SUCH REMOVAL WOULD RESULT IN THE JUDICIAL LEVY OF A TAX.

Under the second branch of the commissioner's argument on the equal protection side of this case, he contends that the exception provided nonresidents as to property held for storage only should be removed from the statute by this Court. Little need be added to what appellant has already said on this point in its main brief.

When the Ohio Legislature enacted the exception, it thereby excluded nonresidents from the levy of the tax. Now, therefore, for this Court to remove the exception would have the result of levying a tax by judicial direction rather than by legislative authority. As this Court observed in *Thompson v. Allen County*, 115 U. S. 550 (1885):

"The Court also said (in *Rees v. Watertown*, 19 Wall. 107 (1874)) the power to direct a tax to be levied is the highest attribute of sovereignty, and is exercised by legislative authority only. It is a power that has not been extended to the judiciary. 'Especially,' says the opinion, 'is it beyond the power of the federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important'." (parenthetical matter added)

Nor has appellant ever asked that the exception be removed, or that the rights or privileges of nonresidents be prejudiced in any way. What it does ask, and what the Constitution guarantees to it, is equal protection with nonresidents by being excepted from the tax on the same basis as nonresidents.

To accomplish this equality of protection, there is no need to remove language from the statute, and thus levy a tax where none formerly existed. It is only necessary to declare former Section 5701.08, Revised Code of Ohio, unconstitutional insofar and to the extent that it taxes property held by residents for storage only. When this is done, and there has never been any question of the Court's power and duty to do it, every Ohio business—resident and non-resident alike—will be protected equally.

For these reasons, appellant submits that the exception accorded nonresidents cannot be removed from former Section 5701.08, Revised Code of Ohio, but that the remainder of the Section should be restricted to meet the requirements of equal protection of the laws, and that this is the proper course and the course which the Ohio Supreme Court should have taken.

Respectfully submitted,

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